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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture, DAVID A. HAMIL, individually and as Administrator of the Rural Electrification Administration, and FRED H. STRONG, individually and as Deputy and as Acting Administrator of the Rural Electrification Administration, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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No.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

EZRA TAFT BENSON, individually and as Secretary of Agriculture, DAVID A. HAMIL, individually and as Administrator of the Rural Electrification Administration, and FRED H. STRONG, individually and as Deputy and as Acting Administrator of the Rural Electrification Administration, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 28, 1957, as amended by order of said Court dated March 12, 1957.

OPINIONS BELOW

The informal memorandum of the District Court denying petitioner's motion for preliminary injunction is unreported and is printed in the record. (R. 29)* The opinion of the Court of Appeals as amended (R. 31, 32) is not yet officially reported and is printed in Appendix A hereto, *infra*, p. 1a.

JURISDICTION

The judgment of the Court of Appeals (R. 33, App. B, *infra*, p. 2a) was entered on February 28, 1957, and an order amending such judgment (R. 34, App. B, *infra*, p. 3a) was entered on March 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When the Administrative Procedure Act grants judicial review to any person adversely affected or aggrieved by agency action within the meaning of any relevant statute, can petitioner, an electric utility company, be denied standing to sue for declaratory and injunctive relief against a loan, made in violation of the Rural Electrification Act, which adversely affects and aggrieves petitioner by excluding it from serving the additional electrical energy requirements of an existing customer?**

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* Nine additional copies of the portions of the record, which were printed in a Joint Appendix for the use of the court below and are included in the record certified to this Court, are filed herewith.

** Although petitioner also claimed standing below on additional grounds, this petition is limited to its claim under Section 10(a) of the Administrative Procedure Act. This claim is in turn limited to the "adversely affected or aggrieved" provision of that Section. No question is presented under the "legal wrong" provision.

STATUTES INVOLVED

The statutes involved are: § 4 of the Rural Electrification Act of 1936, as amended (Act of May 20, 1936, c. 432, 49 Stat. 1365; Act of Sept. 21, 1944, c. 412, 58 Stat. 739-40; and Act of Oct. 28, 1949, c. 776, 63 Stat. 948, U.S.C. Title 7, § 904), which reads in relevant part as follows:

> "The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, * * *."

and § 10(a) of the Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 243-4; U.S.C. Title 5, § 1009(a)), which reads in relevant part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

STATEMENT OF THE CASE

Petitioner, an electric utility company, brought this action for declaratory and injunctive relief against a Rural Electrification Administration loan of approximately $120,000 on the ground that such loan violates the central station service limitation of the Rural Electrification Act and irreparably damages petitioner by excluding it from serving the additional requirements of an existing customer now receiving central station service from petitioner. Under the central station service limitation, loans are authorized "for the furnishing of electric energy to persons in rural areas who are *not* receiving central station service". The term "central station service" is not defined in the Act, but it is a term generally used in the electric industry to mean electricity received from a central generating station as distinguished from an individual generating unit, such as a Delco plant. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 and Part II of the District of Columbia Code, §§ 11-305, 11-306 (R. 2, 3).

With the complaint, petitioner filed a motion for preliminary injunction (R. 10). The District Court denied that motion (R. 29, 30) on the sole ground that petitioner did not have standing to sue, citing *Kansas City Power & Light Company* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. den. 350 U.S. 884. The Court of Appeals affirmed and directed that the complaint be dismissed for lack of standing (Appendix A, *infra*, p. 1a). There has not been any trial or determination of the merits. In this preliminary posture of the case, where the complaint has been ordered dismissed as a matter of law for lack of standing before trial and without determination of the alle-

gations made, petitioner is entitled to have the question of its standing to sue determined on the basis of the well pleaded allegations of its complaint. The pertinent allegations appear in Count One of the complaint (R. 2-7) and may be summarized as follows:

Petitioner (or its predecessor) has for years been furnishing central station service to an industrial customer, Lehigh Sewer Pipe and Tile Company, and is willing and has offered to provide service to meet the requirements of an addition which is being constructed to the facilities of Lehigh. (R. 3-4)

Since Lehigh was receiving central station service from petitioner, there was no authority under the Rural Electrification Act to make a loan to supply the power requirements of the addition to the facilities of Lehigh. Nevertheless, in September, 1955, the Rural Electrification Administration approved a loan of about $120,000 to Central Iowa Power Cooperative* which had as its sole purpose the financing of construction of an electric transmission line to enable Greene County Rural Electric Cooperative* to serve such requirements. (R. 4-5)

After said loan was approved, Greene County Rural Electric Cooperative entered into a twenty year contract with Lehigh to furnish the power requirements of the addition to the latter's facilities. As a result of the illegal loan, petitioner is being irreparably dam-

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* Central Iowa Power Cooperative is a generating and transmission cooperative which furnishes electric energy to Green County Rural Electric Cooperative, a distribution cooperative.

aged in that it is excluded from furnishing the additional power requirements of Lehigh and may be deprived of serving other industrial and municipal customers presently receiving central station service from petitioner. (R. 5-6)

REASONS FOR GRANTING THE WRIT

1. The importance of the question

The question presented by this case is of far reaching importance which should be resolved by this Court—should the scope of the provision of Section 10(a) of the Administrative Procedure Act which grants judicial review to any person adversely affected or aggrieved by agency action within the meaning of any relevant statute be restricted as it has been by the decision below. Few questions are of greater importance in this day when the actions of administrative agencies have such a pervasive effect on the personal and property rights of all. The decision below holds that, even though a person suffers economic loss as a result of administrative action in violation of statutory authority, there is no right to be heard in the courts. Such a decision, even if it were correct, requires review by this Court because of the widespread implications for our system of government and ordered liberty under law which are raised by the threat of unreviewable administrative power. The need for review becomes imperative since the decision below thwarts the objective of Congress in the Administrative Procedure Act, conflicts with views expressed by this Court in *Heikkila* v. *Barber*, 345 U.S. 229, and is wrong.

Passed after a decade of study and concern with the ever-growing administrative process and the need for

keeping it within proper bounds, the Administrative Procedure Act, although brief, "is a comprehensive charter of private liberty" which "emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men."—Foreword by the Chairman of the Senate Committee on the Judiciary to the Legislative History, Administrative Procedure Act, Senate Document No. 248, 79th Congress, 2d Session. The Administrative Procedure Act is thus a "charter of freedom" in the field of administrative law, similar to the Sherman Act in the economic field, which must be applied to achieve its broad purposes with a "generality and adaptability comparable to that found to be desirable in constitutional provisions."—*cf. Appalachian Coals* v. *United States,* 288 U.S. 344, 359-360. As stated by this Court in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 at 41, " ... it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the [Administrative Procedure] Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." The legislative history of the Administrative Procedure Act demonstrates that one of the purposes of Congress was to broaden the scope of judicial review of administrative action as an indispensable aid in preventing "the arbitrary exercise of powers or assumption of powers not granted", and in making certain that statutes are not "blank checks drawn to the credit of some administrative officer or board"—see Senate Document No. 248, *supra,* pages 212, 217, 275, 281-282, 311, 318-319, 368. This history led this Court to say in *Heikkila* v. *Barber,* 345 U.S. 229, 232, that:

> "... The spirit of those statements [in the Senate and House Committee Reports] together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review."

Despite all this, the Court of Appeals has here construed the judicial review provisions of the Administrative Procedure Act in a narrow fashion which drains them of vitality, reduces them to a mere needless restatement of prior law, and completely defeats the Congressional purpose of expanding the availability of judicial review, which is demonstrated by the express language of the Act and its legislative history.

Petitioner, on the basis of the allegations in its complaint, meets every requirement of the Administrative Procedure Act for judicial review. Except where statutes preclude judicial review or agency action is by law committed to agency discretion, Section 10 of the Administrative Procedure Act grants judicial review to either (1) any person suffering legal wrong because of agency action, or (2) any person adversely affected or aggrieved by agency action within the meaning of any relevant statute. The Rural Electrification Act does not preclude judicial review and the approval of rural electrification loans is not committed by law to agency discretion. Petitioner is a person and the approval and administration of the challenged loan is agency action as those terms are defined in Section 2 of the Administrative Procedure Act. The Rural Electrification Act is a relevant statute, since the purpose of the central station service limitation was to protect utilities against federally financed competition for customers already receiving

central station service.* Moreover, the term "relevant" has the broadest possible meaning since both the Senate and House Committee Reports on the Administrative Procedure Act stress that the law "so made relevant is not only constitutional law but any and all applicable law"—Senate Document No. 248, *supra*, pages 212, 276. Finally, petitioner is "adversely affected or aggrieved" by agency action within the meaning of the Rural Electrification Act by virtue of the economic loss it is suffering as a result of the challenged loan—*F.C.C.* v. *Sanders Radio Station*, 309 U.S. 470, 476-7.

The holding of the Court of Appeals that petitioner nevertheless has no right to judicial review reduces the "adversely affected or aggrieved" provision of Section 10(a) of the Administrative Procedure Act to meaningless tautology, affording judicial review only when the "relevant statute" itself grants judicial review. That amounts to turning the Act upside down, since the Act starts from the premise that judicial review is granted "Except so far as (1) statutes preclude judicial review". Such a redundant and illogi-

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* The Solicitor of the Department of Agriculture in a 1942 opinion said the following about the central station service limitation:

> ". . . Practically the entire debate on the limiting clause here under discussion centered about the question of competition. It seems clear from the legislative history that the intent of the limitation was to prevent loans that would create federally-financed competition with existing utility enterprises. . . ."

See transcript of hearings before a Subcommittee of the Senate Committee on Agriculture Appropriations for 1951, 81st Congress, 2d Session, 1378-1379, and see also similar statements by the Solicitor of the Department of Agriculture in a 1948 opinion at page 19568 of the same transcript.

cal result is not lightly to be imputed to Congress. The shambles it makes of the carefully considered and broadly purposed Administrative Procedure Act calls for review by this Court.

2. The need for review because of the concentration of litigation in the District of Columbia Circuit

In addition to the foregoing, there are special circumstances which emphasize the need for review by this Court.

For reasons of jurisdiction and venue, litigation against federal officers and administrative agencies is necessarily concentrated in the District of Columbia Circuit where the great majority of them have their official headquarters, except where statutes expressly provide for judicial review or action in some other circuit. Accordingly, it is extremely unlikely that the Court of Appeals for any other circuit will have an opportunity to construe the judicial review provisions of the Administrative Procedure Act in a case similar to this. The question cannot be left to ripen through the possibility of the development of a conflict between the Courts of Appeal.

The law is now settled in the District of Columbia Circuit. Five of the nine present judges of the Court of Appeals are now on record in this case and in *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. den. 350 U.S. 884, in support of the proposition that Section 10(a) of the Administrative Procedure Act merely codified then existing law with respect to the right of judicial review. Since there is no hope of relief from the Court of Appeals for the District of Columbia Circuit, and since litigation of this kind is necessarily con-

centrated in that Circuit, it is essential that this Court exercise its supervisory power and review the important question presented. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

3. The effect of Kansas City Power & Light Co. v. McKay

The Court of Appeals in this case relied on *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, in which this Court denied certiorari, 350 U.S. 884. That denial is not dispositive here, since it means only that for some reason the petition in that case did not commend itself to four Justices of this Court. In any event, the *Kansas City* case is a far cry from this case. It presented a tremendously complicated situation concerning a large public power project involving the interrelationship of three government agencies and their operations under three statutes. Here there is a simple factual situation involving a loan of about $120,000 under one statute, the Rural Electrification Act, made by one administrative agency. In *Kansas City*, there had been a trial of the principal issue with a judgment on the merits adverse to plaintiffs, before the Court of Appeals determined that there was no standing. Here there has been no trial and no determination of the merits. The *Kansas City* case also was concerned primarily with generation and transmission of power at the wholesale level, while this case deals solely with distribution to an ultimate consumer; petitioner believes and urged below that this difference distinguishes the cases because the central station service limitation of the Rural Electrification Act is clearly relevant where relations with an ultimate consumer are disturbed, but the Court of Appeals held that this difference was not decisive. Both cases involve the

basic question of the right of a privately owned utility company to challenge the legality of a rural electrification loan which adversely affects or aggrieves such company by depriving it of the opportunity to serve existing customers. This case, however, presents the issue in a sharp and simple situation, divorced from any other issues, which commends it for review.

CONCLUSION

If the decision below stands, a substantial blow has been dealt to the system of checks and balances devised by Congress in the Administrative Procedure Act to prevent unlawful administrative action. For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13570

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

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Decided February 28, 1957, as amended March 12, 1957

Mr. Henry T. Rathbun, with whom *Mr. E. Fontaine Broun* was on the brief, for appellant.

Mr. Melvin Richter, Attorney, Department of Justice, with whom *Assistant Attorney General George Cochran Doub* and *Mr. Oliver Gasch*, United States Attorney, were on the brief, for appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and BURGER, Circuit Judges.

PER CURIAM: The District Court was unable to distinguish this case from *Kansas City Power & Light Company* v. *McKay*[1] and therefore concluded as a matter of law that the plaintiff, Iowa-Illinois Gas and Electric Company, had no standing to sue. Upon that basis the trial judge denied the plaintiff's motion for a preliminary injunction. This appeal followed.

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[1] 96 U.S. App. D.C. 273, 225 F.2d 924 (1955), *cert. denied*, 350 U.S. 884, 100 L.Ed. 780, 76 S.Ct. 137 (1955).

Appellant would distinguish the *Kansas City* case, but we are unable to find decisive differences. The order of the District Court must therefore be affirmed and the case remanded with directions to dismiss the complaint.

Affirmed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,570

January Term, 1957.

C. A. 3632-56

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, Chief Judge, and PRETTYMAN and BURGER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: February 28, 1957.

Per Curiam.

Amended by order of Court 3-12-57

Filed Mar. 12, 1957

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,570

January Term, 1957.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, APPELLANT

v.

EZRA TAFT BENSON, Individually and as Secretary of Agriculture, et al., APPELLEES.

Before: EDGERTON, Chief Judge, PRETTYMAN and BURGER, Circuit Judges, in Chambers.

Order

It is ORDERED by the Court that the second paragraph of the judgment entered herein February 28, 1957, be, and it is hereby, amended to read as follows:

> ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and it is hereby, affirmed and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint.

Per Curiam.

Dated: March 12, 1957